

# Russia and Ukraine\*

## I. Introduction\*\*

As this issue of *The International Lawyer* goes to press, the elections for the lower house of the Russian parliament, the Duma, are scheduled to occur on December 2, 2007, and the election for the President on March 2, 2008.<sup>1</sup> President Putin has become the chief representative of the United Russia Party, the largest party in the Duma, and is expected to leave office after two terms, as required by the Russian Constitution.<sup>2</sup> The only other political parties that seem likely to win seats in the Duma are the Communist Party (CPRF) and the highly nationalistic Liberal Democratic Party of Russia. Putin appears to have effective control over the levers of power, including the Federal Security Service (formerly KGB). All seats in the Duma will be awarded by proportional representation with a 7 percent threshold of votes required for any seats to be allocated. The President will be chosen by the citizens in a direct election with secret ballots.<sup>3</sup> The Central Election Commission administers the applicable laws.

There will be observers of the Duma election from the Parliamentary Assembly of the Council of Europe, the Parliamentary Assembly of the Organization for Security and Co-operation in Europe (OSCE), and the Interparliamentary Assembly of the Commonwealth of Independent States. The OSCE's Office for Democratic Institutions and Human Rights regarded visa problems and the limitations imposed on proposed observers as inconsistent with their functions and decided not to participate as an observer.<sup>4</sup> The Russian government's anxiety about the security of its position is reflected in many government actions: the elimination of the direct election of independent candidates to the

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1. *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 2005, No. 21, Item 1919; *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 2003, No. 2, Item 2.

2. *Konstitutsiia Rossiiskoi Federatsii* [Konst. RF] [Constitution], art. 81(3) ("One and the same person may not [act as] President of the Russian Federation for more than two terms [consecutively]").

3. *See id.* at art. 81(1). *See also* *Federal'nyi Zakon* [Federal Law] of Jan 10, 2003, No. 10-FZ, SZRF, 2003 No.1, Item 171 (A federal election law provides that the President is elected by the majority of those who participated in the election and, if no candidate obtains more than half of the votes, a second vote must be taken within twenty-one days in which the President is elected by the plurality of votes).

4. *State Duma Elections Not to be Ignored*, *Kommers.*, Nov. 21, 2007, available at <http://www.kommersant.com/archive.asp>.

Duma; the increase in the number of votes required for eligibility to win seats in the Duma from 5 percent to 7 percent; the refusal to register some political parties; prohibition of the formation of voting blocs by registered political parties to satisfy the 7 percent eligibility threshold; and legislation requiring special and detailed registration by non-government organizations, particularly those which receive funds from outside Russia.<sup>5</sup> Of course, similar regulations are not uncommon in Western democratic countries, but many observers believe that these Russian regulations also reflect the government's desire to assure that there are no protests in Russia like those in Ukraine and Georgia in 2006, which led to a change in those countries' regimes. The Russian leadership seems to assume that these protests were primarily the result of hostile foreign influences.<sup>6</sup>

The Russian economy is booming. In a recent sovereign credit rating, Standard & Poor's reported that Russia's ratings "reflect increasing reserve coverage, measured as months' coverage of current account payments (CAPS); very low general government debt; and impressive noncommodity GDP growth. Growth is likely to exceed 7% in 2007 and 6% in 2008."<sup>7</sup> The report notes that "the non-oil deficit is rapidly widening and is set to stoke inflationary pressures in an economy already operating close to capacity."<sup>8</sup> The Economist reports that the most important factors behind the robust growth in Russia are an estimated 2007 increase in household consumption of 11.7 percent and capital investment of 23.8 percent.<sup>9</sup> The U.S. Ambassador in Moscow told a conference on U.S.-Russia relations that U. S. companies had invested about \$67 billion in Russia in 2007.<sup>10</sup> Dampening all these encouraging reports were estimates by both the World Bank and the Russian Ministry of Economic Development and Trade that the annual inflation rate in 2007 is likely to exceed 11 percent.<sup>11</sup>

Bureaucracy in Russia is also booming. The Russian State Statistics Service reported 1.57 million government workers for 2006—not including municipal workers or employees of government owned and controlled companies—a number which the Russian branch of Transparency International estimated to be less than half the true number.<sup>12</sup> On National Police Day, Vladimir Putin himself urged Russia's law enforcement agencies to combat economic crimes and corruption, declaring that "these 'social ulcers' of our society

5. See Nikolai Petrov, Carnegie Moscow Center, Elections in Russia's Overmanaged Democracy (Apr. 26, 2006), available at <http://www.carnegieendowment.org/events/index.cfm?fa=print&id=882>; How the Duma Electoral System Works, Centre for the Study of Public Policy, University of Aberdeen, 2007, [http://www.russiavotes.org/duma/duma\\_electoral\\_system.php?PHPSESSID=3e85e893ae](http://www.russiavotes.org/duma/duma_electoral_system.php?PHPSESSID=3e85e893ae).

6. Mark Almond, *It's Not Only the Kremlin When it Comes to Election Fraud*, GUARDIAN, Nov. 28, 2007, available at <http://www.guardian.co.uk/commentisfree/story/0,,2218085,00.html>; Luke Harding, *Putin Decries Western Meddling*, GUARDIAN, Nov. 21, 2007, available at <http://www.guardian.co.uk/world/2007/nov/21/russia.lukeharding>.

7. Standard & Poor's Ratings Direct, Sept. 26, 2007, available at <http://www.standardandpoors.com/ratingsdirect>.

8. *Id.*

9. Economist Intelligence Viewswire, Sept. 12, 2007, available at <http://www.economist.com/research>.

10. See William J. Burns, U.S. Ambassador to Russia, Address to the Russian Academy of Science: 200 Years of U.S.-Russian Relations and the Road Ahead, Moscow, Nov. 8, 2007, available at <http://www.cdi.org/russia/johnson/2007-234-32.cfm>.

11. See *World Bank Aays Russia's Inflation Could Hit 11%*, RIA NOVOSTI (Moscow), Nov. 19, 2007, available at <http://www.cdi.org/russia/johnson/2007-239-20.cfm>.

12. See Nikolaus von Twickel, *Red Tape Reaching Its Soviet Heights*, MOSCOW TIMES, Aug. 7, 2007, available at <http://www.cdi.org/russia/johnson/2007-169-1>.

not only hamper Russia's economic development but also do not allow the quality of life in the country to improve."<sup>13</sup> Although "[i]t is routine for people to . . . bribe [Russian] bureaucrats to obtain documents, register property, or secure a place for their child in school," the National Anti-Corruption Committee, a non-government organization based in Moscow, "says such low-level payments make up less than a fifth of all corruption."<sup>14</sup> "Russia ratified the UN Convention against Corruption and the Council of Europe's Criminal Law Convention on Corruption" in 2006 and the "Duma is . . . working on incorporating these measures into Russian legislation."<sup>15</sup> The speaker of the Russian Federation Council, the upper house of parliament, Sergei Mironov, suggested in a speech in Vladivostok that corruption should be punished as high treason.<sup>16</sup>

In addition to economic crimes, the Russian Federation has struggled with attacks on journalists. The investigation of the murder of the journalist, Anna Politkovskaya, at the entrance to her apartment in 2006 has resulted in the arrest of several Chechen mob associates and one low-level official of the Federal Security Service but remains unresolved.<sup>17</sup> There have been a number of appeals by Russian journalists to the European Court of Human Rights in Strasbourg under Article ten of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that "[e]veryone has the right to freedom of expression," including the right "to receive and impart information and ideas without interference by public authority . . ."<sup>18</sup> The Court recently found that three journalists had been unfairly punished with small fines "for criticizing regional officials in print." In one case, Viktor Chemodurov, a reporter for a Kursk newspaper, alleged "misappropriation of regional funds in 2000" by the regional governor. Local officials obtained rulings of the local court imposing fines on the reporter for slander. On appeal to the district court, the fine was upheld. In a subsequent appeal, the Strasbourg court awarded Chemodurov €1,000 in damages.<sup>19</sup> The Moscow Times reported that "Constitutional Court Chairman Valery Zorkin suggested earlier this month that the Constitution be amended to require cases to go through the Supreme Court," which is the highest court of appeals for civil and criminal claims in the Russian Federation, "before they can be filed in Strasbourg."<sup>20</sup>

Both the Russian Federation and Ukraine applied to be members of the World Trade Organization (WTO) fourteen years ago and both continue to seek membership. Both countries must conclude bilateral agreements with each of the members of the working parties established by the WTO. In 2006, the United States concluded bilateral market access agreements with both parties. The adoption by Russia of new intellectual property

13. Galina Stolyarova, *Few Battles Being Won in War on Corruption*, ST. PETERSBURG TIMES, Nov. 13, 2007, available at [http://www.sptimes.ru/index.php?action\\_id=2&story\\_id=23602](http://www.sptimes.ru/index.php?action_id=2&story_id=23602).

14. *Id.*

15. *Id.*

16. Corruption Must be Punished as High Treason—Upper House Speaker, Nov. 12, 2007, ITAR-TASS.

17. See C.J. Chivers, *Killer of Russian Journalist is Known, Editor Says*, NY TIMES, Oct. 8, 2007, available at <http://www.nytimes.com/2007/10/08/world/europe/08russia.html>.

18. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 312 U.N.T.S. 221 (the Russian Federation ratified the Convention in 1991).

19. David Nowak, *Strasbourg Supports Journalists' Claims*, MOSCOW TIMES, Aug. 1, 2007, available at <http://www.cdi.org/russia/johnson-2007-166-12.cfm>; see Chemodurov v. Russia, Eur. Ct. H.R., available at <http://www.echr.coe.int/echr> (Application No. 72683/01; final judgment Oct. 31, 2007).

20. See Nowak, *supra* note 19.

laws, discussed *infra*, and concessions to U.S. exports of beef, pork, and poultry products should strengthen U.S. support for Russian WTO membership. Nevertheless, there remain impediments to Russian accession because of its unwillingness to permit "foreign banks to open branches" within Russia, as well as Russia's retention of "discretion to limit new foreign direct investment in financial services if overall foreign investment exceeds 50% of total investments in the sector." A more significant obstacle to Russian access may be its difficult relations "with Georgia, which withdrew from its bilateral agreement" to support Russian WTO membership.<sup>21</sup> The prospects for the final approval of Ukrainian accession into the WTO are more promising, as discussed below.

## II. Intellectual Property Law Reform

By far the most important development in the business-related legal environment of the period was the adoption of the Fourth Part of the Civil Code, the new Russian intellectual property (IP) legislation.<sup>22</sup> The new legislation was adopted at the end of 2006, and entered into force January 1, 2008. This is a comprehensive and all-inclusive statute; the existing IP legislation, mostly adopted in 1992-1993, is abolished as of that date. Nevertheless, the reform is not as radical as it might seem; the new legislation largely restates or clarifies old legislation. But the new legislation "also introduces some [notions] not known to Russian law before, such as 'unified technology'[,] [i]mportantly, the new . . . legislation addresses [some] issues . . . of international concern, [including the issue of] phony right-management organizations granting licenses to" dubious music-selling web sites (such as Allofmp3).<sup>23</sup>

The Fourth Part of the Civil Code consists of eight chapters comprising 327 articles (arts. 1225-1551, an article being a quantum of law similar to a U.S. section). According to the new legislation, the law protects the "results of intellectual activities and the means of individualization," including the following: (1) works of science, literature, and art; (2) computer programs; (3) databases; (4) performances; (5) phonograms; (6) air and cable broadcasts; (7) inventions; (8) useful models; (9) industrial designs; (10) agricultural selection achievements; (11) integrated circuit topographies; (12) trade secrets (know-how); (13) firm names; (14) trademarks and service marks; (15) appellations of geographical origin of goods; and (16) commercial designations.<sup>24</sup> The most controversial object of IP rights, the domain name, was stricken off from the original draft by the parliament. Note also that unfair competition issues are not covered by the Civil Code; instead, they are dealt with by the anti-monopoly legislation.<sup>25</sup>

The Civil Code introduces a new blanket notion of "intellectual rights," including (1) the exclusive right in an intellectual property object, which is classified as a property right;

21. Valentin A. Povarchuk, *WTO Accession Update: Where do Russia and Ukraine Stand?*, Russia/Eurasia Comm. Newsletter (ABA Sec. Int'l L.), May 2007, at 12.

22. See generally *Grazhdanskii Kodeks RF* [GK] [Civil Code] (Russ.) (Civil Code Part Four, beginning at art. 1225) (translated in LEXIS Garant 7) [hereinafter GK RF].

23. Sergey Budylin & Yulia Osipova, *Total Upgrade: Intellectual Property Law Reform in Russia*, 1 Colum. J. E. Eur. L. 1 (2007).

24. GK RF, *supra* note 22, at art. 1225.

25. See generally *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 135, Item 3434 (translated in LEXIS Garant 12048517); see also GK RF, *supra* note 22, at arts. 1252(7), 1512(2)(6) (mentioning unfair competition in passing).

(2) "personal non-property rights," known to a Western lawyer as moral rights, and (3) "other rights," which do not exactly fit into the economic-moral dichotomy. The third category includes, in particular, the continuation right (the artist's right in a percentage of resale proceeds, known in the United States under its French name *droit de suite*) and the right of access to one's own work for its reproduction. Both latter rights relate to fine art objects only.<sup>26</sup>

The Civil Code allows the creation of organizations for the collective management of authors' rights (known as copyright in the United States) and related ("allied") rights.<sup>27</sup> Generally, a contract with a right owner is required for a right-management organization to manage an owner's rights.<sup>28</sup> A state-accredited organization, however, may manage an owner's rights without that right owner's permission, unless the owner explicitly objects.<sup>29</sup> The state-accreditation requirement as a precondition of non-contractual right-management is an important legal innovation, obviously intended to solve the problem of phony right-management organizations.

Some of the intellectual right objects, such as inventions and trademarks, must be state-registered to be legally protected; other objects, including literary and musical works as well as computer programs, need not be registered. The registration is carried out by the federal organ of executive power in intellectual property (currently Rospatent), save for agricultural selection achievements registered by a separate agency.<sup>30</sup> Disputes may be solved by courts, but in certain cases the first-instance forum is a specialized board run by the relevant state agency (Rospatent's Patent Dispute Chamber).<sup>31</sup>

Generally, the principles of legal protection of IP objects remain unchanged. The author's rights chapter provides for comprehensive protection of the copyright and other author's rights in virtually all types of expressive works, including computer programs.<sup>32</sup> No formalities are required for legal protection, though voluntary registration is available for computer programs and databases.<sup>33</sup> The general protection term is the life of the author plus seventy years.<sup>34</sup> The allied rights chapter protects some copyright-related rights, covering performances, broadcasts, and phonograms. As a legal novelty, databases and public-domain material publications are also protected by the neighboring right law provisions.<sup>35</sup>

The patent rights chapter protects intellectual rights in inventions, utility models, and industrial designs.<sup>36</sup> A utility model differs from an invention in that it is not required to be non-obvious.<sup>37</sup> Industrial designs are artistic, rather than technical, design solutions.<sup>38</sup>

26. See GK RF, *supra* note 22, at art. 1226. Cf. Michael D. Murray, International Art Law 262 (2007) (discussing the moral right notion in the United States and international context) (on file with author).

27. See GK RF, *supra* note 22, at art. 1242(1).

28. See *id.* at art. 1242(3).

29. *Id.* at art. 1244(3)-(4).

30. *Id.* at art. 1246(3)-(4).

31. *Id.* at art. 1248(1)-(2).

32. *Id.* at art. 1259(1).

33. *Id.* at arts. 1259(4), 1262.

34. *Id.* at art. 1281.

35. *Id.* at art. 1304(1).

36. *Id.* at art. 1345(1).

37. *Id.* at art. 1351.

38. *Id.* at art. 1352.

Exclusive rights in all three types of objects are protected subject to their registration with Rospatent.<sup>39</sup> Notably, the Russian priority system is first-to-file rather than first-to-invent.<sup>40</sup> The term of protection begins on the filing date and is twenty years for inventions, ten years for utility models, and fifteen years for industrial designs.<sup>41</sup>

The breeding achievement chapter grants *sui generis* protection to plant varieties and animal breeds, subject to state registration.<sup>42</sup> The term of protection is thirty years.<sup>43</sup> *Sui generis* protection is also granted to microchip topologies. Their state registration is optional,<sup>44</sup> and the term of protection is ten years.<sup>45</sup>

A trade secret (know-how) is defined as information that derives actual or potential commercial value from being unknown to third parties; to which third parties do not have legally permissible access; and in respect to which the information owner introduced the regime of commercial secrecy.<sup>46</sup> The regime of commercial secrecy is defined by separate legislation. A trade secret is protected for as long as the information remains actually secret.<sup>47</sup>

Means of individualization include firm names, trademarks and service marks, appellations of (geographical) origin of goods, and commercial designations. Firm names are commercial company names, with protection based upon company (federal) registration.<sup>48</sup> Trademarks and service marks identify one's goods or services, respectively.<sup>49</sup> The protection of a mark is based on its federal registration.<sup>50</sup> Unregistered trademarks are not protected by trademark law. The term of protection is ten years, with the possibility of unlimited prolongation.<sup>51</sup> Well-known trademarks are protected separately.<sup>52</sup>

An appellation of origin of goods is a toponym (derived from the name of a geographical place) that became known as a result of its use in relation to a good, the "special qualities of the good originating exclusively or essentially from place-specific natural or human factors."<sup>53</sup> For legal protection the appellation of origin must be registered with Rospatent.<sup>54</sup> The term of protection is ten years, but may be prolonged indefinitely.<sup>55</sup>

Commercial designations are a substantial legal novelty. They are defined as designations, other than firm names, used for the individualization of trade, industrial, and other enterprises.<sup>56</sup> No state registration is required. One might say that in some respects a commercial designation is similar to an unregistered trade name, while in other respects it

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39. *Id.* at art. 1353.

40. *Id.* at art. 1350(2).

41. *Id.* at art. 1363.

42. *Id.* at art. 1414.

43. *Id.* at art. 1424.

44. *Id.* at art. 1452.

45. *Id.* at art. 1457.

46. *Id.* at art. 1465.

47. *Id.* at art. 1467.

48. *Id.* at art. 1473.

49. *Id.* at art. 1477.

50. *Id.* at art. 1479.

51. *Id.* at art. 1491.

52. *Id.* at art. 1508.

53. *Id.* at art. 1516.

54. *Id.* at art. 1517.

55. *Id.* at art. 1531.

56. *Id.* at art. 1538.

is similar to an unregistered trademark. It is not now exactly clear how the commercial designation law will interact with the firm name law and trademark law.

The last chapter of the Fourth Part of the Civil Code introduces a new notion of unified technology. It is described, rather vaguely, as a result of scientific and technical activity, expressed in an objective form, and comprising inventions, utility models, industrial designs, computer programs, or other protectable results of intellectual activity, which can be a technological basis of a certain practical activity in the civil and/or military spheres. The elements of the unified technology are protected under appropriate rules and are not necessarily owned by the technology owner. The right to use them in combination, however, belongs to the person who organized the creation of the unified technology based on contracts with the respective exclusive right owners of the technology elements.<sup>57</sup> Importantly, the provisions of the chapter are applicable only to the technologies created using state (federal or regional) financing.<sup>58</sup>

Some amendments were also made to the other parts of the Civil Code. Perhaps most importantly, the basic list of "civil right objects" in Article 128 was changed to the following: (1) things, including money and securities; (2) other property, including property rights; (3) work and services; (4) protected results of intellectual activity and means of individualization equated to them (intellectual property); (5) non-material benefits. Notably, "information" has been excluded from the list.<sup>59</sup> The First Part of the Civil Code was also supplemented by Article 152, protecting an individual against misappropriation of his or her image (e.g., actors must be paid for using their photos in advertising).<sup>60</sup>

Generally, the new IP legislation looks well thought-out and arguably WTO-ready. Perhaps the most important question from the point of view of foreign right owners is how the new legislation will deal with Russian pirate websites selling copyrighted music at fabulously low prices. Shutting down such sites has been mentioned as a precondition for Russia to join the World Trade Organization (WTO).<sup>61</sup> Apparently, U.S. experts liked the new Russian IP legislation: in November 2006, after President Vladimir Putin submitted the bill to the parliament, the United States gave their support to Russia's admission to the WTO.<sup>62</sup>

With respect to pirate websites in Russia, the most notorious probably has been Allofmp3. In December 2006, Allofmp3 was sued in the United States for \$1.65 trillion.<sup>63</sup> Alas, the site has not survived to see the new Part Four enter into force in January 2008; the site disappeared from the web in June 2007. Unfortunately, this hardly can be traced

57. *Id.* at art. 1542.

58. *Id.* at art. 1543.

59. *Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF]* [Russian Federation Collection of Legislation] 2006, No. 52, Item 5497 (translated in LEXIS Garant 12051067, at art. 17).

60. *Id.*

61. See, e.g., Frank Ahrens, *U.S. Joins Industry in Piracy War*, WASH. POST, Jun. 15, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/14/AR2006061402071.html>.

62. *U.S. Paves Way for Russia WTO Entry*, BBC NEWS, Nov. 19, 2006, available at <http://news.bbc.co.uk/2/hi/business/6163008.stm>; *Russia-U.S. WTO Protocol Conducive for Mutual Trade—Putin*, RIA NOVOSTI NEWS AGENCY, Nov. 19, 2006, available at <http://en.rian.ru/russia/20061119/55779900.html>.

63. Scott M. Fulton, *U.S. Music Publishers Sue AllofMP3 for \$1.65 Trillion USD*, BETANEWS, Dec. 21, 2006, available at [http://www.betanews.com/article/US\\_Music\\_Publishers\\_Sue\\_AllofMP3\\_for\\_165\\_Trillion\\_USD/1166739613](http://www.betanews.com/article/US_Music_Publishers_Sue_AllofMP3_for_165_Trillion_USD/1166739613) (describing \$1.65 trillion lawsuit brought by Sony, EMI, Warner, Universal, and others against AllofMP3 in a U.S. federal court).

to an increase in the efficiency of the Russian legal system. In fact, in July 2007 the former head of Allofmp3, Denis Kvasov, was acquitted on criminal charges of copyright infringement. This is perhaps not surprising because the site operated under a license obtained from a rights-management organization. In August 2007, the site became available on the web again; although music is not currently sold, the site owners promise to resume trading soon.<sup>64</sup>

Technically, the activities of dubious websites is based on a loophole in the current Russian IP legislation, allowing rights-management organizations in some situations to manage IP rights without the right owner's permission.<sup>65</sup> As discussed above, although this possibility is retained in this legislation as a matter of principle, rights-management organizations engaged in such non-contractual licensing will be put under government control. This provides a legal means for solving the pirate site problem. Of course, it is still to be seen how the new legislation will be enforced.

### III. Abolition of Currency Control Restrictions

Beginning January 1, 2007, the remaining currency control restrictions for transactions between residents and non-residents of Russia were removed. The Currency Regulation and Currency Control Law, originally dated 2003 and repeatedly amended throughout the period, envisaged several types of currency control restrictions.<sup>66</sup> Unlike earlier legislation, this law did not require individual Central Bank permission for foreign currency transactions between residents and non-residents, be it current or capital transactions. For some types of capital transactions, however, other types of restrictions were introduced. Specifically, some types of capital transactions, such as granting loans or buying securities, had to be carried out via special bank accounts, and a certain percentage of the transaction amount had to be put aside for a certain period of time as a "reserve." Also, opening bank accounts by residents in certain foreign countries required prior registration of the account with Russian authorities. At the beginning of 2007 all of these restrictions expired by the terms of the law itself. (In fact, most of them were lifted even earlier, in July 2006.)

The lifting of the restrictions does not mean the absolute lifting of currency controls. The state still keeps an eye on transactions between residents and non-residents. Banks, acting as currency control agents, are required to obtain documentation from their clients and to check the documentation related to such transactions.<sup>67</sup> Russian residents are also required to notify (*post factum*) their local tax authorities upon opening bank accounts abroad.<sup>68</sup> Foreign currency transactions between Russian residents are, as a general rule,

64. Valeriy Kodachigov & Inna Erokhina, *Allofmp3 Prerval Musykalnuyu Pausu [Allofmp3 Broke a Musical Pause]*, KOMMERS., Aug. 28, 2007, available at <http://www.kommersant.ru/doc.aspx?DocsID=799137>.

65. Sergey Budylin & Yulia Osipova, *Is AllofMP3 Legal? Non-Contractual Licensing Under Russian Copyright Law*, 7 J. HIGH TECH. L. 1 (2007).

66. *Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF]* [Russian Federation Collection of Legislation] 2003, No. 50, Item 4859 (translated in LEXIS Garant 3885608), amended by Federal Laws of June 29, 2004, No. 58-FZ, of July 18, 2005, No. 90-FZ, of July 26, 2006, No. 267-FZ, of Dec. 30, 2006, No. 267-FZ, of May 17, 2007, No. 83-FZ, of July 5, 2007, No. 127-FZ.

67. *Id.* at art. 23(4).

68. *Id.* at art. 12(2).



prohibited.<sup>69</sup> But the currency control obstacles for international commerce are now completely removed.

#### IV. Participation Exemption

In May 2007, a participation exemption provision was first introduced into the Tax Code (Article 284(3)); the provision entered into force January 1, 2008. "Participation exemption" essentially means that corporate income from participation in other companies (dividends and sometimes capital gains) is exempted from corporate taxation provided certain conditions are met. According to the new provision, the corporate profit tax rate for a Russian organization with respect to an item of dividend income from a subsidiary shall be zero, provided that at the date of adoption by the subsidiary of the dividend payment resolution the following conditions are met: the parent organization has owned for at least 365 days uninterruptedly at least 50 percent in the share capital of the subsidiary company, and, in addition, the share of the parent organization in the capital was acquired for at least RUR 500M (currently about \$20 million). The participation exemption covers dividends received from both Russian and foreign subsidiaries.<sup>70</sup>

Participation exemption tax provisions are commonplace in Europe. Such provisions are generally seen as a means to eliminate economically undesirable double taxation of corporate income (first as the income of a subsidiary, then as the income of its parent). The existing participation exemption rules in such countries as Cyprus, the Netherlands, and Luxembourg (together with other circumstances) made them popular bases for establishing international holding companies.<sup>71</sup> In particular, European companies are often used by Russian residents themselves for investing in Russia and holding Russian assets. Notably, according to the official Russian data, Cyprus, the Netherlands, and Luxembourg, in this order, are world leaders in accumulated foreign investments in the Russian economy (with the United States on the honorable sixth line).<sup>72</sup>

Perhaps one reason behind the introduction of the participation exemption into Russian tax law was to persuade Russian businesses to create their principal holding companies in Russia, rather than abroad. If successful, the attempt may have important implications for how middle-to-large sized Russian businesses are organized. It should be noted, however that the Russian participation exemption provision looks much less attractive than its analogues in major holding jurisdictions. The participation threshold of 50 percent, with a minimum of RUR 500 million, is very high, as compared with the competitors (1 percent in Cyprus, 5 percent in the Netherlands, 10 percent in Luxembourg—and no minimum!). Also, capital gains are not exempted from taxation in Russia. Accordingly, the new provision may have substantial impact only for rather large holdings and only where the investment income is restricted to dividends.

69. *Id.* at art. 9.

70. *Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF]* [Russian Federation Collection of Legislation] 2007, No. 21, Item 2462 (translated in LEXIS Garant 12053487, at art. 1).

71. See, e.g., PRICEWATERHOUSECOOPERS, *Corporate Taxes: Worldwide Summaries 2004-2005* 195, 484, 574 (2004).

72. Rosstat, *Ob Inostrannykh Investitsiyakh v I Polugodii 2007 Goda [On Foreign Investments in the 1st Half-Year of 2007]*, available at [http://www.gks.ru/bgd/free/b04\\_03/IssWWW.exe/Stg/d030/i030430r.htm](http://www.gks.ru/bgd/free/b04_03/IssWWW.exe/Stg/d030/i030430r.htm).

## V. Contingency Fee Prohibition

Providing an example of court-made law, the Russian Constitutional Court recently authorized the prohibition of contingency fee provisions in legal service contracts although such fees are permissible under Russian legal ethics rules in legal service contracts related to monetary disputes.<sup>73</sup> In 1999, the Supreme Arbitration Court (SAC) issued an informational letter saying that contingency-fee agreements for the provision of legal services are unenforceable against clients.<sup>74</sup> SAC informational letters, unlike SAC Plenum rulings, are not legally binding. But all arbitration courts (albeit not the general jurisdiction courts) treat such documents as having absolute persuasive value, in practical terms—the force of law.<sup>75</sup> As a result, arbitration courts consistently refused to enforce the agreements in question.

Law firms have been unhappy with the de facto prohibition of the contingency fee, and ultimately one of them challenged the constitutionality of the SAC interpretation of the law before the Constitutional Court on grounds of freedom of contract and other bases. In January 2007, the Constitutional Court rejected this challenge and found that the SAC interpretation did not violate the Constitution. The Court argued that the Civil Code definition of service contracts envisages performance of certain actions, not reaching a certain result.<sup>76</sup> Such broad language of the Constitutional Court decision may have important consequences because this apparently means the prohibition of contingency fees in all service provision contracts, without limiting it to legal services. Only one (of nineteen) Constitutional Court Judges, Anatoliy Kononov, dissented, arguing for the freedom of contract between a lawyer and the client.<sup>77</sup> Fortunately, the ruling leaves room for allowing the contingency fee by statute; however, currently the parliament does not seem to be interested in the matter.

## VI. Ukraine Edges Closer to WTO Membership

Since gaining its independence in 1991, Ukraine has sought to integrate its economy into the global economy. One of the obstacles it has encountered has been creating favorable trading conditions between it and the world community. In part, this obstacle

73. Kodeks Professionalnoy Etik Advokata [Advocate Professional Ethics Code], Ros. gaz., Oct. 5, 2005, at art. 16(3), available at <http://www.rg.ru/2005/10/05/advokat.html>.

74. Supreme Arbitration Court Presidium, Informatsionnoe Pismo [Informational Letter] of Sep. 29, 1999 No. 48, Vestnik VAS RF, No. 11, 1999 (Russ.).

75. The Supreme Arbitration Court and lower arbitration courts have a unique jurisdiction over commercial and economic claims, which is separate from the general civil and criminal court system. The term “arbitration” in this context refers to the administrative settlement of disputes and includes, as a relatively small part of its authority, the area of jurisdiction which is customarily considered arbitral jurisdiction in Western countries. See WILLIAM E. BUTLER, *RUSSIAN LAW* 166-171 (2nd ed. 2003).

76. Constitutional Court, Postanovlenie [Decision] of Jan. 23, 2007, No. 1-P, Vestnik Konst. Suda RF, 2007, No. 1 (Russ.), at Para. 3.1 (translated in LEXIS Garant 12051675). The Court referred to GK RF [Civil Code] art. 779 (1) which provides: “Under a contract for the provision of compensable services, the service provider undertakes at the customer’s request to render a service (perform specified actions or carry out a specified activity), while the customer undertakes to pay for the service rendered.” *RUSSIAN CIVIL CODE ANN.* 567 (Christopher Osawke trans., 2000).

77. See Sergey Budylin, *Neprinuditelnye Sdelki v Rossiyskom Prave [Unenforceable Contracts in Russian Law]*, 3 Zh. R. P. [Russian Law Journal] 56, 60 (2007); see also Sergey Budylin, *A Comparative Study in the Law of the Non-Existent: Contract Invalidity in the U.S. and Russia*, 15 *Currents: Int’l Trade L.J.* 28.

has roots in Ukraine, for Ukraine has experienced times when its government has “focused more on preventing structural change than facilitating it.”<sup>78</sup> At other times, especially in the years immediately following independence, Ukrainians considered nation-building as their paramount concern, which, “[i]n practical terms, meant establishing Ukraine’s separateness from Russia.”<sup>79</sup>

Today, the development of a free market economy in Ukraine is inextricably linked to establishing mutually beneficial trade relations with other countries so that Ukrainian services and products can be marketed internationally. This is precisely why integration into the European community<sup>80</sup> and joining the World Trade Organization (WTO) are among the top priorities in the country’s cross-border trading policies. These priorities are shared by Ukraine’s citizens, the majority of whom favor their nation’s joining the EU and the WTO.

On May 31, 2007, Ukraine’s parliament, the Verkhovnia Rada, passed eleven laws whose passage was a prerequisite to Ukraine’s crossing the threshold to the final stage of talks on its joining the WTO.<sup>81</sup> Most of these laws became effective on January 1, 2008, thus setting the stage for Ukraine’s accession into the WTO.<sup>82</sup> One of these laws was the Law of the State System of Bio-safety in Creating, Testing, Transporting and Using Genetically-Modified Organisms (GMOs), which was signed by Ukraine’s President on June 11, 2007. It addresses a sensitive issue in Ukraine and elsewhere, the development of agricultural biotechnology and the use of genetically modified (GM) crops. At the time it was signed, Ukraine did not have a workable system for approving and regulating agricultural biotechnology. Notwithstanding the enactment of the new agricultural biotechnology law, the absence of a functioning system will persist until implementing regulations are promulgated.<sup>83</sup>

Because of the absence of a workable system for regulating the testing, approval, and use of GM crops, little agricultural biotechnology research and teaching is now done in Ukraine. Nor has Ukraine approved a single biotechnology crop for commercial production.<sup>84</sup> Nevertheless, there are reports that Ukrainian scientists have developed transgenic sugar beets, potatoes, cabbage, and other commercial crops, apparently using non-patented techniques that used germplasm of local varieties to produce insect resistance or herbicide tolerance.<sup>85</sup>

78. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD SURVEYS: UKRAINE ECONOMIC ASSESSMENT 9 (2007).

79. SERHY YEKELCHYK, UKRAINE: BIRTH OF A MODERN NATION 193-94 (2007).

80. For a discussion of the harmonization of Ukrainian legislation with that of the EU, see Roman Petrov, *Past and Future Action on Approximation of Ukrainian Legislation to that of the EU* (undated), available at <http://wider-europe.org/research/papers/Petrov2007.pdf>.

81. A listing of these laws can be found at the Ukraine and the World Trade Organization website, available at [http://wto.in.ua/index.php?lang=en&get=13#pager\\_31763](http://wto.in.ua/index.php?lang=en&get=13#pager_31763) (Russ.).

82. Some minor legislative work remains, including amendments to anti-dumping investigation procedures. See *Verkhovna Rada Hampers Ukraine’s Integration into the WTO*, UKRAYINSKA PRAVDA, Nov. 11, 2007, available at <http://www.pravda.com.ua/en/news/2007/11/11/9396.htm>.

83. USDA FOREIGN AGRIC. SERV., UKRAINE AGRICULTURAL BIOTECHNOLOGY REPORT 2007, GAIN Rep. No. UP7013, July 13, 2007, at 6 [hereinafter UKRAINE AGRICULTURAL BIOTECHNOLOGY], available at <http://www.fas.usda.gov/gainfiles/200707/14629165.pdf>.

84. *Id.* at 3; FAO RESEARCH AND TECH. DEV. SERV., THE STATUS OF AGRICULTURAL BIOTECHNOLOGY AND BIOSAFETY IN UKRAINE (undated) at 16-17, available at [http://www.fao.org/sd/dim\\_kn4\\_060601\\_en.pdf](http://www.fao.org/sd/dim_kn4_060601_en.pdf).

85. UKRAINIAN AGRICULTURAL BIOTECHNOLOGY, *supra* note 83, at 3.

Agricultural biotechnology has many consequences, including consumer uncertainties over the safety of GM products and the implications for agricultural producers who, for one reason or another, do not benefit from it. And there are international trade implications. Although no locally produced GM products have been approved in Ukraine, Ukraine's imports of agricultural products that might include GM crops were valued at \$39 million in 2005, and this sum increased by 59 percent to almost \$62 million in 2006. Brazil, Netherlands, and the United States, respectively, were the three largest suppliers of these products.<sup>86</sup> A workable system for regulating GM agricultural commodities in Ukraine could also encourage the importation of raw commodities such as GM soybeans for further processing in Ukraine.<sup>87</sup> In a related action, on August 1, 2007, the Ukrainian Cabinet of Ministers adopted Decree Number 985 requiring the government to begin labeling all imported and domestically sold food products that have a biotech content greater than 9 percent. Baby foods containing any GMOs cannot be imported, produced, or sold in Ukraine.<sup>88</sup> Another agricultural measure was passed in May 2007, one that equalized the taxation of domestic and foreign milk and meat suppliers until January 1, 2008. Ukraine's agricultural fiscal policy has been the target of recommendations for improvement.<sup>89</sup>

Much of the world knows Ukraine because of its Orange Revolution.<sup>90</sup> Ukrainians, however, know that Ukraine's political future shares the stage with its economic future. As to the latter, these two laws serve as a reminder that Ukraine must continue to focus on the structural reorganization of its economy. Ukraine needs to reorient its economy from a natural resources and energy oriented economy to a high-tech economy. While this year saw Ukraine take steps that put it at the threshold of WTO membership, with 2008 now its predicted entry date, when Ukraine will become a WTO member was most accurately stated by its Minister of Foreign Affairs, Arseniy Yatsenuk, when he said: "We will join the WTO when we will."<sup>91</sup>

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86. *Id.* at 4.

87. *Id.* at 5.

88. USDA FOREIGN AGRIC. SERV., UKRAINE PASSES BIOTECH LABELING REQUIREMENTS, GAIN Rep. No. UP7016, Aug. 6, 2007, available at <http://www.fas.usda.gov/gainfiles/200708/146291951.pdf>.

89. See, e.g., World Bank, *Improving Agricultural Fiscal Policy in Ukraine*, June 20, 2006, available at <http://siteresources.worldbank.org/INTUKRAINE/Resources/328335-1158937917927/AgriculturalFiscalPolicyEng.pdf>.

90. See generally ANDREW WILSON, UKRAINE'S ORANGE REVOLUTION (2005); REVOLUTION IN ORANGE: THE ORIGINS OF UKRAINE'S DEMOCRATIC BREAKTHROUGH (Anders Aslund & Michael McFaul eds., 2006).

91. Tatyana Silina, *Why Haven't We Joined the WTO?*, ZERKALO NEDELI [Mirror of the Week], Sept. 29-Oct. 5, 2007, available at <http://www.zn.ua/1000/1600/60604> (Russ.).